

## POLICY NUMBER 7 FOR PROFESSIONAL FORESTERS REGISTRATION

### SUMMARY OF CASE LAW FOR PURPOSE OF CLARIFYING GROUNDS FOR RPF DISCIPLINARY ACTION UNDER RESOURCES CODE, SECTION 778(b):

The failures of responsibility which subject a RPF to “Disciplinary Action” (Pursuant to PRC, 778) are summarized as below, to provide general reference and guidance only. CURRENT APPLICABLE CODES AND CASE LAW TAKE PRECEDENCE.

1. Deceit is either:
  - (a) The suggestion, as a fact, of that which is not true, by one who does not believe it be true; or,
  - (b) The assertion, as a fact, of that which is not true, by one who has no reasonable grounds for believing it to be true; or,
  - (c) The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want to communication of that fact; or,
  - (d) A promise, made without any intention of performing it. Civil Code, Section 1710.

Fraudulent Deceit: “One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers.” Civil Code, Section 1709.

Deceit Upon the Public: “One who practices a deceit with intent to defraud the public, or a particular class of persons, is deemed to have intended to defraud every individual in that class, who is actually misled by the deceit.” Civil Code, Section 1711.

2. Fraud is a bad faith, dishonest or overreaching act done with intent to deprive another of his right, or in some manner to do a person an injury. It includes all surprise, trick, cunning, dissembling and unfair ways by which another is cheated. As distinguished from gross negligence, it is always intentional.

Actual Fraud. See Deceit above with addition of:

- (e) Any other act fitted to deceive.  
Civil code, Section 1572.
3. Incompetence is a demonstrated lack of ability, skill, or knowledge to perform professional functions. Such lack may be demonstrated by a single and specific incident or by a series of lesser failures in performance. This is not to say that a single honest failing in performing his/her duties constitutes incompetence in a RPF’s practice. Because of the difficulty in defining incompetence, performance standards are established by expert witnesses and relate to specific instances, time and place.

4. Material Misstatement of Fact is a misstatement that would be likely to affect the decision of the administrative agency or reasonable person in the transaction in question. In contracts, material facts are those which constitute substantially the consideration of the contract, or without which it would not have been made. For purposes of the Forest Practice Act and Code Section 4583.5 in particular, a material misstatement in a Timber Harvesting Plan or a report submitted to the Department would thus include any misstatements which would be likely to affect the Department's decision with respect to the Timber Harvesting Plan or report.

"A 'misrepresentation' is 'material' if it would be likely to affect the conduct of a reasonable man with reference to the transaction in question." Costello v. Roer (1946) 77 Cal.App.2d 174, 175 Pp.2d 65.

5. Misrepresentation is a conduct or a representation contrary to fact made by a RPF, under circumstances in which a reasonable RPF would not have made the representation. There need not be actual or constructive intent to deceive. Misrepresentation can occur when a RPF holds himself/herself out to be specially qualified, when in fact the RPF is not; it may also occur when a RPF knowingly acts on an insufficient basis of readily available information commonly accepted by a reasonable and prudent by the RPF community in making a representation.

Negligent Misrepresentation:

- (a) The respondent must have made a representation as to a past existing material fact.
  - (b) The representation must have been untrue;
  - (c) Regardless of respondent's actual belief, the representation must have been made without any reasonable ground for believing it to be true;
  - (d) The representation must have been with the intent to induce plaintiff to rely upon it;
  - (e) The plaintiff must have been unaware of the falsity of the representation; he must have acted in reliance upon the truth of the representation and he must have been justified in relying upon the representation.
  - (f) And, finally as a result of his reliance upon the truth of the representation, the plaintiff must have sustained damage. Book of Approved Jury Instructions (BAJI), 12.45.
6. Gross Negligence is an extreme departure from the prudent standards of conduct or performance, which may be established by expert witnesses. It is the exercise of so little care that it justifies the belief that the person was indifferent to the interests and welfare of other people or natural resources. Gross negligence does not require actual or constructive intent.

“The intentional, conscious failure to do a thing that is incumbent upon one to do, or the doing of a thing intentionally that one ought not to do.” *Pilot Industries v. Southern Bell Tel. & Tel. Co.*, D.C.S.C., F.Supp. 356, 362.

“The exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. A finding a gross negligence is made by applying an objective test: If a reasonable person in the defendant’s position would have been aware of the risk involved, then the defendant is presumed to have had such an awareness.” *People v. Soledad* (1987, 5<sup>th</sup> Dist) 190 Cal.App.3d 74, 235. Cal.Rptr. 208.

Gross – great; absolute; exists in its own right, and not as an appendage of another thing of all measure; beyond allowance; not to be excused; flagrant; gross carelessness.

Negligence – “Negligence is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to those shown by the evidence. It is the failure to use ordinary or reasonable care. Ordinary or reasonable care is that care which persons of ordinary prudence would use in order to avoid injury to themselves or others under circumstances similar to those shown by the evidence. [You will note that the person whose conduct we set up as a standard is not the extraordinary cautious individual, not the exceptional skillful one, but a person of reasonable and ordinary prudence.]” BAJI 3.10.

Actionable Negligence: “[A] legal duty to use due care, breach of that duty, and a proximate or legal causal connection between the breach and plaintiff’s injuries.” *E.F. Hutton & Co. v. City National Bank* (1983, 2<sup>nd</sup> Dist) 149 Cal. App. 3d 60, 196 Cal. Rptr. 614).

7. CODE SECTIONS NOTED IN FELONY CRITERIA, 14 CCR §1613 that may be substantially related to the duties of a RPF:

(a) Public Contract Code

Section 10422 Corrupt performance of official act. “Any officer or employee of the department who corruptly performs any official act under this chapter to the injury of the state...”

Section 10423 Corruptly permitting violation of contract; felony. “Any person contracting with the state by contract who corruptly permits the violation of any contract made under this chapter...”

(b) Business and Professions Code

Division 7 – Part 2 – Preservation and Regulation of Competition

(c) Health and Safety Code

Division IX, Part I, Explosives

8. Failure of Fiduciary Responsibility may be tied to Grounds for Disciplinary Action.

Fiduciary Responsibility – A relation subsisting two persons in regard to a business, contract, or piece of property, or in regard to the general business or estate of one of them, of such a character that each must repose trust and confidence. It may involve an agreement where a person delivers a thing to another on the condition he will restore it to him. Violation of fiduciary responsibility may arise from recklessness (inadequate records, etc.). It differs from fraud which is willful.

(Fiduciary Responsibility – Duty)

“In performing professional services for a client, a [forester] has the duty to have that degree of learning and skill ordinarily possessed by reputable [foresters], practicing in the same or a similar locality and under similar circumstances.” It is the forester’s “duty to use the care and skill ordinarily used in like cases by reputable members of his or her profession practicing in the same or a similar locality under similar circumstances, and to use reasonable diligence and his or her best judgment in application of his or her learning, in a effort to accomplish the purpose for which he or she was employed. A failure to fulfill such duty is negligence: BAJI 6.37.

Note: A felony conviction could occur when a contractor received payment and does not pay for materials or labor rendered – the word “fraudulent” is not mentioned in this statute. Federal or out-of-state codes may also not refer to fraud in some situations.

## **POLICY NUMBER 8 PROFESSIONAL FORESTERS REGISTRATION**

### **HANDLING OF A COMPLAINT (DISCIPLINARY PROCESS) for RPFs**

Note: The disciplinary process is governed by the Public Resources Code (PRC); Title 14 California Code of Regulation (14 CCR), Evidence Code (EC), Code of Civil Procedure (CCP), and Government Code (GC). For the benefit of interested persons, the following provides a narrative of the typical sequence followed in implementing these Codes. The attached flow charts are a visual presentation of this process.

#### **The Complaint**

A complaint can be filed by a person, in writing, with Professional Foresters Registration, or the Board of Forestry and Fire Protection (Board) can proceed upon its own (PRC, Section 775). The RPF's vested property right of the license is protected under "due process". The Executive Officer must verify that the complaint is legally subject to possible disciplinary action (i.e., fraud, deceit, misrepresentation, gross negligence, etc; PRC, Section 778). If the matter is, or becomes, a criminal court action, the Administrative action will likely be delayed until a judicial determination is rendered.

#### **Confidentiality**

A complaint is a CONFIDENTIAL matter (GC §6254(f), and §11183). The identity of the person filing the complaint remains confidential throughout the investigation (EC §1041). This may become public information if Hearing testimony from the complainant is required or if the person's identity is otherwise pertinent to the case. If the complaint does not come under the grounds for discipline, the RPF will still be notified that a complaint was received and of their subsequent exoneration. Confidentiality will likely limit the amount of information that can be provided.

#### **Processing a Complaint**

The Executive Officer may take the matter to the Professional Foresters Examining Committee (PFEC) at any stage of processing.

If the failures of RPF responsibility are well-documented (e.g. violations, citations, court records, or other documents), the RPF is given an opportunity to provide his or her side of the story in response to the issues of concern (allegations). The RPF is advised that the reply may be used against him or her in the process, and may choose not to respond. If needed, expert witnesses may be involved to establish RPF prudent standards of conduct given the same set of circumstances. If the RPF is willing to admit to any failures of responsibility, the Executive Officer may suggest the RPF sign a Stipulated Agreement implementing specified discipline (i.e., suspension, some possibly "stayed" which creates probation, or revocation).

When the issues are not well-documented, the Executive Officer initiates an investigation. This may involve professional investigators from the Department of Consumer Affairs, which is the agency most involved with California licensing boards. The investigator gathers the evidence of what occurred, and is subject to the Evidence Code. Professional forester direction and advice is provided by the Executive Officer, and in some cases, independent RPFs. The investigator interviews witnesses while stressing the confidential nature of the matter, and gathers leads as appropriate. As soon as all information necessary for professional investigation is obtained, the RPF is notified by the Executive Officer who will explain that Professional Foresters Registration

is coordinating an investigation on complaint allegations. The Executive Officer may enumerate the allegations to the RPF under investigation or the investigator may make the allegations known when presenting questions. When the RPF is personally contacted by the investigator, the RPF will be asked if he/she is willing to be interviewed to discuss facts important to the case. The RPF is also allowed to make a written statement.

If the case involves risk that evidence can be changed, or witnesses impacted, the Executive Officer may not disclose the allegations to the RPF until the investigator makes them known in presenting questions. The RPF is personally contacted by the investigator who asks the RPF if he/she is willing to be interviewed to discuss facts important to the case. The RPF may refuse to be interviewed. The investigator may ask the RPF details about occurrences important to the case. Information gathered may be used against the RPF. The RPF may also make a written statement to the investigator.

These stages in the process are sensitive because many RPFs feel they should be able to face his/her accuser at this point. Because no Accusation has been filed, there is no accuser. Many RPF's feel they should have an attorney present when talking with the investigator, but it is not required. Only facts are being gathered for consideration by the PFEC to recommend appropriate action. At any time evidence warrants criminal action, however, the investigator may read the RPF the Miranda rights prior to gathering statements. A Criminal Complaint may be independently requested by Consumer Affairs, Division of Investigation, or a District Attorney if the evidence warrants such action.

#### Peer Review

The Executive Officer reviews the RPF's response to the allegations, stipulated Agreement, or investigation report with the PFEC. Statements made and evidence presented in the review, however, could be used in an Accusation.

When incriminating evidence is sufficient at any time in the process, one or more RPF's serving as "Expert Witnesses" may examine the situations regarding the complaint.

"Standards" of performance are established using the "prudent forester concept" where the evaluation by independent RPF's of similar qualifications and experience, is used to establish proper and prudent actions in any specific situation.

The possible action recommended by the PFEC to the Executive Officer at this point can include: 1) Exoneration; no further action warranted, 2) confidential letter stating the Committee's concerns, 3) recommend to the Board that a Private Board Reprimand be issued, 4) recommend to the Board that the Stipulated Agreement be approved, or 5) proceed with an Accusation. Cases are considered closed after condition 1, 2, and 3. Cases are not considered Closed after condition No.'s 4 and 5.

#### The Accusation

If disciplinary action without a Stipulated Agreement is anticipated, the Executive Officer in coordination with counsel from the Attorney Generals' Office, prepares a Statement of Issues and the Accusation(s) included.

Filing the Accusation with the Office of Administrative Hearings makes the matter public, and the Accusation is available upon request.

Sent with the Accusation, the Statement to Respondent notifies the RPF that a Notice of Defense may be filed requesting a hearing. At this point, the RPF is advised he/she may want seek representation by legal counsel. The RPF cannot access the investigation working notes or attorney work product. The evidence which will be submitted at the hearing, including reports of any witnesses, can be obtained so he/she may prepare a defense. This is called "discovery." (GC §11507.6) If the RPF finds the evidence to be submitted at the hearing is true and complete, he/she may choose to accept, on the merits of the Accusation, possible Board disciplinary action. This is done by signing a Stipulated Agreement which imposes license suspension or revocation with conditions satisfactory to the Board as appropriate discipline.

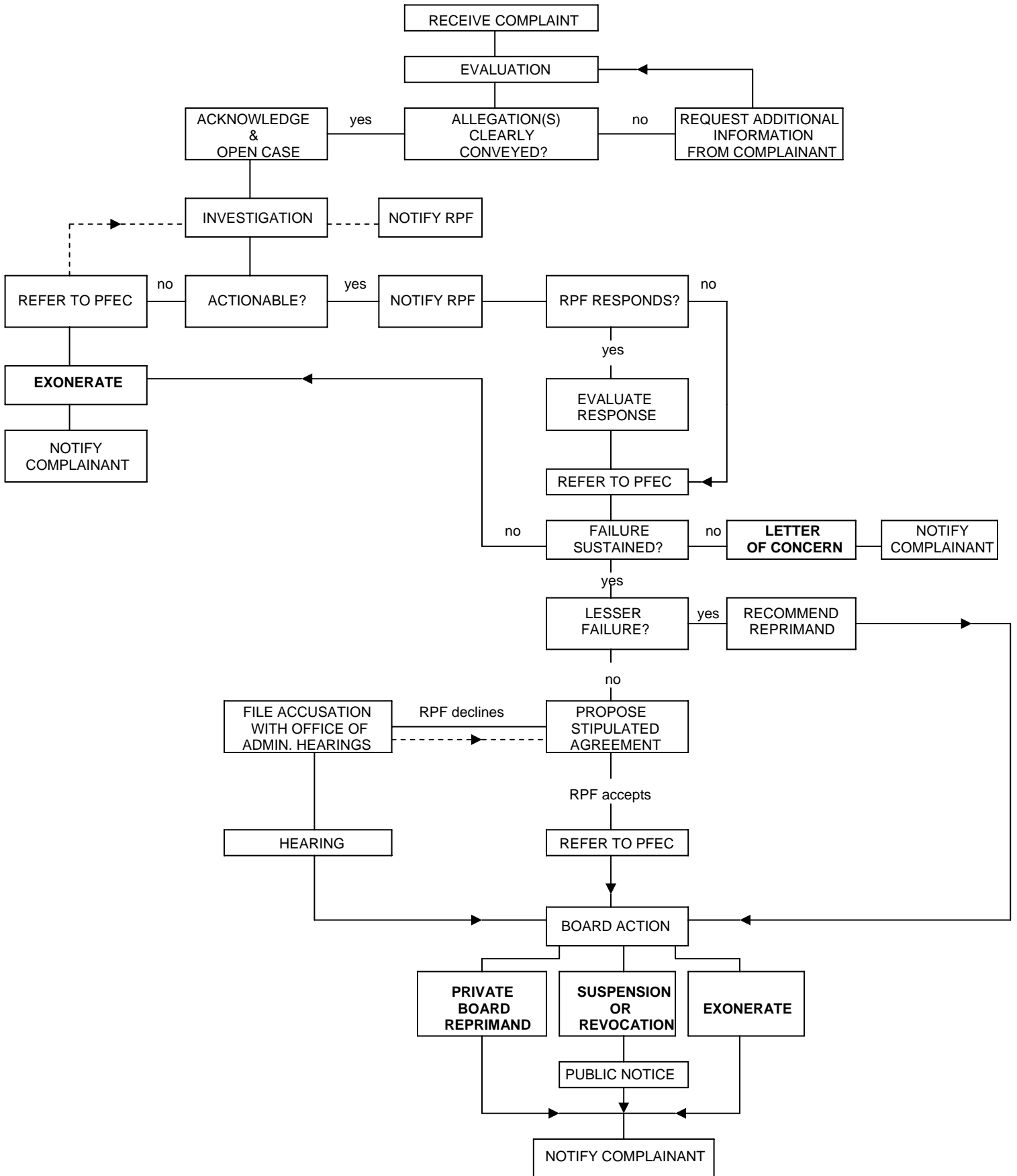
## Hearing

In the absence of a Stipulated Agreement, an Administrative Law Judge (ALJ) weighs the investigation evidence and the standards of prudent conduct established by the expert witnesses against the evidence provided by the accused RPF. The cost of each party's counsel is borne by the respective party. The accused RPF can provide self representation (no counsel). The burden of proof is "clear and convincing evidence of reasonable certainty." The ALJ prepares a recommendation for Board action. The ALJ is encouraged to utilize the Disciplinary Guidelines in 14 CCR §1612.1 and Criteria for Rehabilitation in 14 CCR §1614.

## Board Actions from Hearings Findings

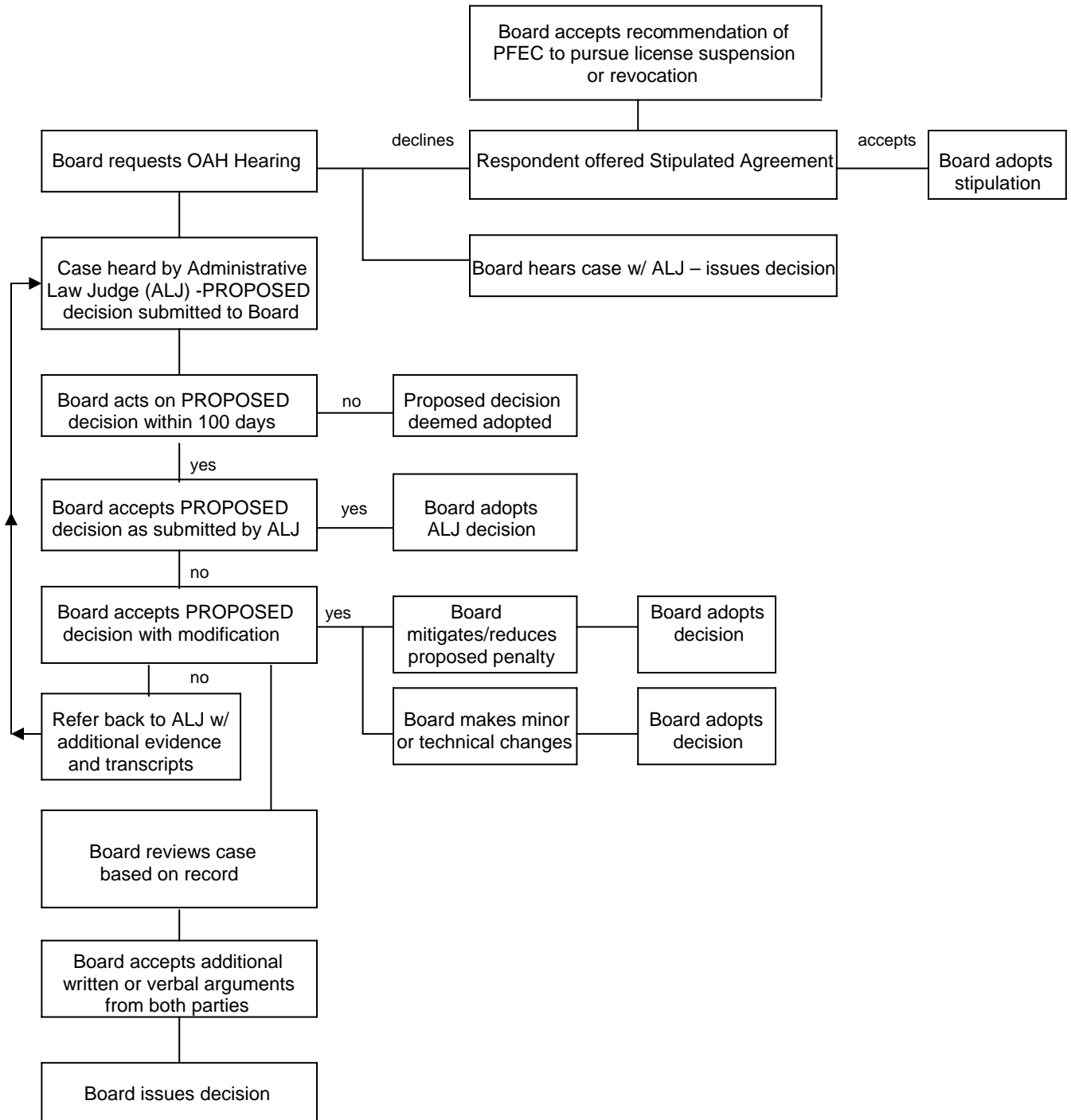
A second counsel from the Attorney General's Office represents the Board in considering the decision of the ALJ. In considering the decision of the ALJ, the Board may adopt, modify the recommendations, send the entire matter back to the same ALJ, or reject the proposed decision and review the case on the record and arrive at a decision (GC §11517). The proposed decision of the ALJ is not binding, unless the Board fails to act within a specified time period. Acting within the specified time period, the Board shall render the final decision relative to suspension or revocation. The Board's final options are: 1) exoneration, 2) suspension, or 3) revocation of license. The Board may allow the RPF to complete existing contracts if action is taken. In a suspension, part can be "stayed" which creates probation; the existing employer or clients must be notified of the discipline per 14 CCR §1612.2. The Board may specify possible conditions for rehabilitation for consideration when the RPF later requests license reinstatement. The Government Code, Section 11522, requires that a minimum of one year pass before the Board can consider a petition for reinstatement. The applicant may submit evidence of rehabilitation.

**PROFESSIONAL FORESTERS REGISTRATION**  
**Disciplinary Process Flowchart- Complaint Against RPF**





**PROFESSIONAL FORESTERS REGISTRATION**  
**Disciplinary Process Flowchart- License Suspension or Revocation**  
(ref: Government Code §11517)



## **POLICY NUMBER 9 FOR PROFESSIONAL FORESTERS REGISTRATION**

### **HOW TO FILE A COMPLAINT**

If a person wishes to file a complaint of professional misconduct against a Registered Professional Forester, the complaint must be submitted in writing, and mailed to Professional Foresters Registration, P.O. Box 94426, Sacramento, CA 94244-2460, (916) 653-8031.

For purpose of providing direction to the Executive Officer of Foresters Licensing, the Board of Forestry and Fire Protection (Board) suggests that all complaints be filed in a consistent format and include the following information:

1. The identity of the person who is the subject of the complaint, including his or her license number if known;
2. A short description of the transaction or circumstances involved;
3. The date and place (city or county) where the events occurred;
4. The identity and addresses or telephone number of any other person(s) who have knowledge of the events described;
5. A description of the loss, damage or other adverse consequences of the licensee's conduct;
6. Copies of pertinent portions of any plans, reports, letters, business records or other documents which support the complaint.

All complaints shall contain the following verification:

### **VERIFICATION**

**I CERTIFY UNDER PENALTY OF PERJURY OF THE LAWS OF CALIFORNIA THAT THE FACTS STATED HEREIN ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.**

**DATE:**

**CITY OR PLACE:**

**SIGNATURE:**

**NOTE TO COMPLAINANTS:** The complainant will receive a letter from Professional Foresters Registration acknowledging receipt of the complaint approximately 3 weeks after submittal. The complaint will then go through an initial review by the Executive Officer. You may be contacted by the Board to provide clarification or additional information. If a complaint you file results in prosecution, you must be willing to testify in the case. You will be notified by the Board if this is necessary. You will also be notified of the final action taken on the case.

## POLICY NUMBER 10 FOR PROFESSIONAL FORESTERS REGISTRATION

### Review of Probationary Work Products

As part of some stipulated agreements between the Board of Forestry and Fire Protection (Board) and disciplined RPFs to resolve licensing cases, independent review is required of written timber harvest plans and other related documents done by the RPF while on probation before they are submitted to the California Department of Forestry and Fire Protection (Department) for review and possible approval. It is the responsibility of the RPF being disciplined to arrange for the independent review of his/her work product while on probation. It is the intent of the Board that this type of review will increase the thoroughness and completeness of the work that goes into professional documents prepared by the RPF. To help guide those involved in this review and reporting, the Board suggests that the following standards may be useful to achieve the rehabilitation objective:

**Products to be reviewed:** All current forms of specified documents should be reviewed prior to the original submission to the Department. This includes standard timber harvesting plans, emergency timber harvesting plans, modified timber harvesting plans, and any other type(s) of plans involving timber harvest or major amendments to any of these documents the Board may create in the future. Depending on the nature of the case, this review may also apply to Confidential Archeological Addenda, stocking reports and other THP related documents.

**RPF Reviewer:** Must be a licensed Registered Professional Forester, or other appropriate professional, who is involved in the timber harvest plan process, either in reviewing or writing THPs, and who has a working knowledge of current timber harvest plan regulations. RPF must have a current license to practice forestry and not be subject to any open disciplinary case concerning their RPF license. Those RPFs directly involved in the regulatory review of the specific plan (either in an office or on the ground) after submission to the Department shall not be involved in this prior review of the plan.

**Review:** Unless stipulated otherwise, it is the intent of the Board for this review to be an office check of the completeness of information that went into the specified document(s), and the presentation of that information in the document. The RPF under probation is not prevented from getting the reviewer to go over the document, or portions of the document in the field, but this is not required.

The review of the document should include what sources were used to obtain information, the documentation the RPF has of those sources, and how it is presented. For example, where the list of adjacent landowners names and addresses for Public Notice was obtained, where is it documented, and how is it presented in plan. It is not expected of the reviewer to check whether the names are spelled correctly or that the addresses are accurate. A guide for the reviewer is the THP checklist originally developed by California Licensed Foresters Association, or other appropriate documents. Completing the checklist would provide an adequate review of the plan, combined with assessment of adequacy of source information.

Should reviewer find deficiencies in the document being reviewed, suggestions should be made to the RPF to correct problem(s) before submitting the document to the Department. It is not the responsibility of the reviewer to make sure that those corrections are made, but rather it is up to the RPF. A second review of document before submission is up to the RPF, and is not mandatory.

**Certification of Review:** The reviewer shall document and certify in writing to the PFEC that a review of a specific document has occurred. A letter to the PFEC shall be sent within 7 days of the review, stating what was reviewed, what the results of that review were, and if reviewer believes the document met generally acceptable professional standards for timber harvest plans documents submitted to the Department.

**Costs:** It is up to the RPF to pay for the cost of having the reviewer participate in this process.

**Other Work Products:** Other work plans or documents reporting work done by or under the supervision of the RPF may require independent RPF review of those work products during probation. If so, that review shall be specifically addressed on a case by case basis in the stipulated agreement.